STATE OF MICHIGAN

SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
AND THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

GERLING KONZERN ALLGEMEINE VERSICHERUNGS AG, Subrogee of REGENTS OF THE UNIVERSITY OF MICHIGAN,

Plaintiff-Appellant,

vs.

CECIL R. LAWSON and AMERICAN BEAUTY TURF NURSERIES, INC., Jointly & Severally

Defendant-Appellee.

_____/

Supreme Court No: 122938

Court of Appeals No: 237284

Lower Court No: 99-11061 CZ
Hon. Timothy P. Connors

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SUPPLEMENT TO BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES INVOLVED

(1) **DID THE ABOLITION OF JOINT LIABILITY IN MOST TORT ACTIONS, MCL 600.2956 ELIMINATE THE RIGHT OF CONTRIBUTION AMONG SETTLING TORTFEASORS UNDER MCL 600.2925a?**

(2) **UNDER WHAT CIRCUMSTANCES DOES A "COMMON LIABILITY" AMONG SETTLING TORTFEASORS AND NON SETTLING ALLEGED TORTFEASORS EXIST? DOES "COMMON LIABILITY" REFER TO JOINT LIABILITY ONLY, OR DOES IT INCLUDE SEVERAL LIABILITY? HOW SHOULD "COMMON LIABILITY" BE CONSTRUED IN LIGHT OF THE LANGUAGE OF MCL 600.2925a(1) PROVIDING A RIGHT OF CONTRIBUTION "WHEN 2 OR MORE PERSONS BECOME JOINTLY OR SEVERALLY LIABLE IN TORT FOR THE SAME INJURY TO PERSON OR PROPERTY OR FOR THE SAME WRONGFUL DEATH"?**

(3) **WHEN A TRIER OF FACT MUST ALLOCATE LIABILITY IN DIRECT PROPORTION TO A PERSON'S PERCENTAGE OF FAULT, MCL 600.2957(1), WHEN, IF EVER, MIGHT A TORTFEASOR'S SETTLEMENT OF A CASE INCLUDE ANOTHER ALLEGED TORTFEASOR'S PERCENTAGE OF FAULT?**

(4) **DOES THE INJURED PARTY'S ACTUAL AMOUNT OF DAMAGES PLAY A ROLE IN DETERMINING WHETHER A SETTLING TORTFEASOR HAS PAID MORE THAN ITS PRO RATA SHARE? IF SO, HOW IS THIS AMOUNT PROVED? ARE AMOUNTS PAID BY THE SETTLING TORTFEASOR FOR THE NON-FAULT REASONS (SUCH AS A DESIRE FOR QUICK RESOLUTION OR FOR ANONYMITY) SEPARATED OUT AND, IF SO, HOW?**

(5) **WHAT IS THE PLEADING BURDEN ON CONTRIBUTION PLAINTIFF WHO ALLEGES THAT DEFENDANT IS A TORTFEASOR, THAT PLAINTIFF HAS PAID MORE THAN ITS PRO RATA SHARE OF COMMON LIABILITY, THAT DEFENDANT HAS NOT PAID ITS PRO RATA SHARE OF LIABILITY?**

(6) **WHAT IS THE EFFECT IN THIS CASE, IF ANY, OF THE FACT THAT PLAINTIFF ALREADY PAID DEFENDANT TO SETTLE DEFENDANT'S CLAIMS AGAINST PLAINTIFF AND THE FACT THAT PLAINTIFF DID NOT ATTEMPT TO JOIN DEFENDANT IN THE UNDERLYING SUIT AGAINST PLAINTIFF?**

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ARGUMENT

I. THE ABOLITION OF JOINT LIABILITY IN MOST TORT ACTIONS ELIMINATED THE RIGHT OF CONTRIBUTION AS TO A PARTY THAT ENTERS INTO A SETTLEMENT.

With the passage of the 1995 Tort Reform legislation (supra ft nt 4 in original brief) MCL 600.2956 replaced joint liability with several liability for damages, only. The provision provides as follows:

> Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability for each defendant for damages is several only and is not joint. However, this section does not abolish and employer's vicarious liability for an act or omission of the employer's employee.

MCL 600.6304 (4) provides as follows:

> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater that his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to (a) a defendant that is jointly and severally liable under section 6312.

To better understand the provisions of the contribution statute, it is important to note that originally there was a bar under the common law for contribution among or between joint tortfeasors. As pointed out in *O'Dowd v General Motorist 419 Mich 597, 603, 604; 358 NW2d 553 (1984)* the legislature had originally adopted the 1939 Uniform Contribution Among Tortfeasors Act . The Legislature then: "substituted the substance of the 1955 Uniform Contribution Among Tortfeasors Act for the 1941 Act." *Id. 603, 604.* The statute followed the revised 1955 Act and, in so doing almost verbatim adopted subsection (a) of the 1955 Act. Subsection (a) of the Uniform Contribution Act provides as follows:

> (a) Sec.2925a. (1) Except as otherwise provided in this act, *where two* or more persons become jointly or severally liable in tort for the same injury to a person or property or the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them

Under the 1955 Act it used the two words "where two"; when the Legislature enacted the

contribution statute, using the 1955 Act as a model it substituted those two words for "when 2". This is only pointed out to demonstrate that the 1955 provision was adopted almost verbatim. The change in these two words are not relevant to this appeal. But what is important is that the 1995 Act used the language "become jointly or severally liable in tort", and this is the language that was adopted by the Michigan Legislature when it enacted the contribution statute. The importance of this is that the prior contribution statute which was enacted in 1941 and 1961 provided for contribution in favor of joint tortfeasors, only. It did not provide for contribution for wrongdoers who may have been severally liable. By statute the common-law rule had been partially abrogated by allowing contribution by two or more persons jointly liable. In *Moyses v Spartan Asphalt 383 Mich 314, 329, 334; 174 NW2d 797 (1970)* the Supreme Court abolished the remnants of the common-law rule that did not permit contribution among and between wrongdoers (severally liable).

When the Legislature repealed the prior contribution statute (MCL 600.2925) which allowed for contribution among joint tortfeasors, only, it enacted MCL 600.2925a which was modeled, as stated previously, after the 1955 Uniform Contribution Among Tortfeasors Act. What the Legislature set about to correct by enacting 600.2925a, is that a party jointly or severally liable in tort for the same injury could be liable for contribution. The statute provides as follows:

> Sec. 2925a (1) Except as otherwise provided in this act, when 2 of more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

With the passage of tort reform, Michigan has adopted what is referred to as the "modified type" of comparative fault. Just as an aside, the modified type, when referring to the plaintiff provides in part as follows:

> If that person's percentage of fault is greater than the aggregate fault of the other person of persons, whether or not parties to the action, the court shall reduce economic damage by the percentage of comparative fault of the persons upon whose injury or death the damages are based as provided in section 6306, and non-economic damages shall not be awarded. MCL 600.2959.

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This concept of pure verses modified comparative fault was discussed in the Commissioners' Prefatory Notes regarding the Uniform Comparative Fault Act as prepared by the National Conference of Commissioners on Uniform State Laws. (NCCUSL) See Appendix 14b.

What is of importance is that the NCCUSL when discussing states that have adopted the modified type of comparative fault recognize that the provisions of the Uniform Contribution Act of 1955 are not suitable in a state that has adopted comparative fault. The commentaries comment states as follows:

> The NCCUSL has promulgated two uniform contribution Acts - the first in 1939., superceded by a revised Act in 1955. Both of these Acts provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is **inappropriate in a comparative- fault state apportioning ultimate responsibility on the basis of the proportion of fault of the parties involved.** (Emphasis added). NCCUSL Commissioners' Prefatory Note p. 3 Appendix 14 b.

Within that comment the Commissioners' point out that they did not amend the 1955 Act and left it in place for possible use by states that do not adopt the principles of comparative fault and goes on to say that the 1955 Act contains appropriate sections covering the rights existing between parties who are jointly **and** severally liable in tort. Once again referring to situations only in which the parties are responsible for the same common liability or at risk for paying an amount greater is representative of its percentage of fault. It is pointed out that this latter situation existed under the 1985 Tort Reform in Michigan and also, currently exists as it relates to medical malpractice actions.

As set forth in the original brief, prior to the 1995 Tort Reform, parties may be jointly **and** severally liable under the common law; meaning that each defendant that contributed to the same harm was liable to the plaintiff for the whole amount of recoverable damages. Furthermore, a plaintiff may elect to bring an action against one or more of the alleged tortfeasors, and if all damages are sought from one that tortfeasor would be severally liable. The concept of several liability, was discussed in *O'Dowd, supra 604* where the Supreme Court explained that the prior

provision of the Contribution Statute that allowed contribution only in situations where there was a judgment obtained **against two or more persons jointly** was rectified by the amendment of MCL 600.2925a where it added the language "jointly or severely liable in tort . . .".

When the term jointly **or** severally liable is used in the statute it refers to: (a) wrongdoers the liabilities of whom arise out of variant legal positions, the concurrently applied but legally different derelictions of whom make them severally responsible to the plaintiff in damages, or (b) to the acts or omissions of several who act independently rather than in concert or (c) those that are held responsible to the plaintiff on account of their causally cooperating but non-joint acts or omissions by the negligence of one, the violation of a statute like the dram shop act by another, and the breach by still another of an express or legally implied warranty. *Moyses v Spartan Asphalt 383 Mich 314, 329, 334; 174 NW2d 797 (1970).*

Another situation where there may be several liability is where the plaintiff brought an action such as in *O'Dowd* where some but not all of the damages are recoverable against a defendant based upon a statutory cause of action such as the Dram Shop Act or the Wrongful Death Act. In that case the two defendants became severally liable but only for the damages arising out of the same injury. That is to say, the contribution that was sought in *O'Dowd* was the loss of support, society and companionship, which are damages recoverable under the Dram Shop Act as to defendant Hillcrest, as well as against General Motors as the manufacturer of the motor vehicle. But what is significant is that a right of contribution as to whether or not the parties are jointly or severally liable is not the sole determinant as to whether or not there exists a right of contribution; a party must be responsible for all the common damages. *O'Dowd, supra 604.*

The *O'Dowd* court also made it clear that the revision of the Act required that between the tortfeasors they: "commonly share a burden of tort liability or, as it is sometimes put, there is common burden of liability in tort." In reliance upon this the Supreme Court cited among other

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cases, *Caldwell v Fox, 394 Mich 401, 415-422; 231 NW2d 46 (1975); O'Dowd, supra 604-605.*

The basic concept is that the tortfeasors each must commonly share the burden of tort liability which is precisely what the concept of joint liability or several liability is premised upon. If the tortfeasors exposure to damages are different, rather than sharing a like injury, then there exists no right of contribution. *Moisenko v Volkswagen AG 10 F.Supp. 2d 853 (W.D. MI. 1998)* Appendix 9b.

Recall, *Caldwell* and *O'Dowd* were prior to the 1985 passage of Tort Reform which allowed the apportionment of fault between the respective tortfeasors. As set forth in the original brief, however, with the 1985 Tort reform there still could exist joint and several liability if the plaintiff was free from fault, therefore, there continued to exist a common burden of liability as to the plaintif and, therefore, a right to seek contribution. If the plaintiff was comparatively at fault and one of the defendants did not pay its proportionate share of liability, then a percentage of that defendants liability was paid by the remaining defendants. That difference in payment gave rise to a cause of action for contribution between those parties for the difference paid. MCL 600.6304(4), (6) (a,b)

Under the concepts of joint and several liability or, jointly or severally liable a party could be liable for all the damages arising out of the same injury. As such, a party whose liability is joint **and** several, and who pays all of the damages or a greater amount would be within the ambit of the contribution statute. Likewise, when one refers to jointly **or** severally liable, it is in the situation that brought about the amendment by including wrongdoers who did not act in concert or in the ways as discussed in *Moyses* and *O'Dowd at 604* that are severally liable, not jointly but, nonetheless, have a common obligation to pay all of the damages. So when one looks at the terms "joint and several", or "jointly or severally" (as used in the statute), the terms several/severally are read either in the context of joint liability or independent liability but have the same consequence that the wrongdoers are responsible for all common damages.

In order to seek contribution, one must be liable for all damages or an amount greater than

the parties pro rata share. Without this exposure there exists no claim for contribution. This is made clear in the next section of the contribution statute. Simply meeting subsection (1) does not bestow any viable claim for contribution. There are other subsections that must be met.

The Contribution Statute at MCL 600.2925a(2) is the next requirement for the establishment of a claim for contribution. Recall that there must be a sharing of a common burden for there to be a right to contribution. Under § 2925 a(2) it requires that a party pay: " more than its pro rata share of the common liability", and the total recovery is limited to the amount paid by him in excess of his pro rata share. This section of the statute provides as follows:

> Sec. 2925a(2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the **common liability** and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability. (Emphasis added)

With the passage of the 1995 Tort reform the concept of a common burden or obligation or to say, "common liability" , was abolished in most tort actions. In discussing the interrelationship of common liability with the principle of contribution the Supreme Court stated as follows:

> "The general rule of contribution is that one who is **compelled** to pay or satisfy the whole or to bear more than his aliquot share of the **common** burden or obligation, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them the payment of their respective shares."(Emphasis added). *Caldwell v Fox, 394 Mich 401, 417; 231 NW2d 46 (1975)*

MCL 600.2925a(2) requires that for there to be a right of contribution a tortfeasor must pay more than his pro rata share of the common liability and couples with it that a party against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability.

Jointly or severally liable is to be read in the context of having the risk of paying either the total obligation or a percentage of the obligation over and above a parties proportionate share. If a plaintiff is free from fault, as currently remains the law, relating to medical malpractice actions as

set forth in §6304(6)(a), or ones proportionate share if the plaintiff is at fault subject to reallocation and there exists a right of contribution. §6304(6)(b). That under previous tort reform enactments, PA 1986 No. 178 applying to the former MCL 600.6304(3) if the plaintiff was free from fault then allocation of fault between defendants as to that plaintiff does not apply leaving one or more of them solely responsible for the damages. If plaintiff is at fault then there is an allocation if one of the defendants is uncollectible and there exists a right of contribution. MCL 600.6304(PA 1986 No. 178). As such, the same principle giving rise to a contribution claim under the former law still applies as it relates to medical malpractice actions. Once again, under the new Tort Reform Act, the medical malpractice claim is carved out as an exception to the abolition of joint liability, or to say, common liability for all the damages or paying a percentage of uncollectible damages.

With the passage of the 1995 Tort Reform in most other tort actions, including this claim before this Court, there is no longer the risk of a party paying all sums if the plaintiff is free from fault or for that matter, even paying a proportionate share of another defendants liability which that defendant does not pay directly to the plaintiff. This common burden or common obligation or as the statue uses the term "common liability" has in fact been abolished by the 1995 Tort reform enactments. Recall that in order to proceed for contribution there must not only be joint or several liability, meaning exposure to all or in excess of a proportionate share but also, under subsection (2) the payment must have been in an amount greater than a parties pro rata share of the "common liability." The party against whom it is sought is not compelled to make a payment beyond his own pro rata share of the "entire liability". The clear reading of all these terms lead to but one conclusion is that the Contribution Statute does not apply to most tort actions with the exceptions of those that have been specifically carved out providing for joint liability for certain type of torts.[1]

This now takes us to a further analysis of MCL 600.2925a(2) which requires that the

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1 See MCL 600.6304(4) referring to §600.2956, §600.6312, §600.6304(6).

tortfeasors must share a "common liability." These terms must now be read in conjunction with modern tort law where fault is apportioned. The concept of common liability, therefore, is equated with joint and several liability or with the concept of several liability. Regardless of the application the various ways in which a party may be severally liable it all entails the same common thread and that is there is a common burden or to say a common liability for the injury sustained by the plaintiff. Reading MCL 600.2925 a(1) and 600.2925a (2) together they compliment one another and clearly demonstrates that the legislature limited contribution where there continued to exist common liability.

But we are now in a completely new arena of Tort Reform legislation being several liability only, and never being obligated to pay a sum greater than a parties proportionate share. The use of the term "several" under § 600. 2956 takes on a meaning that there does not exist liability shared in common with any other tortfeasor. More importantly, MCL 600.6304(4) provides: "A person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1)." There simply does not exist any risk for a common burden or common liability or exposure to pay any sum over and above a parties percentage of fault. Since the concept of common liability no longer applies in most tort actions, what is the liability referred to as? In *Smiley v Corrigan, 248 Mich App 51, 53 N6 638 NW2d 51 (2001)* the Court of Appeals recognized that the statutory language of 1995 PA 161; 1995 PA 249 is clear and unambiguous. The house legislative analysis that addressed the provisions of Tort Reform, is worth reviewing as to the abolishment of common liability in most tort situations, replacing it with "fair share liability." It provides in part as follows:

> This bill takes a common sense approach to reforming the state's civil justice system. It says, in essence, that defendants should pay their fair share of damage awards and no more. . . . . this bill would essentially abolish joint and several liability and replace it with "fair share liability." . . .
>
> It being clear that "joint and several" or "jointly or severally" liability all refer to a common

liability. By abolishing the principle of one party being called upon to pay all damages or a greater percentage of a parties liability has, in almost all instances abolished common liability. What it has been replaced with is now referred to as "fair share liability." With that understanding it becomes clear that contribution has been abolished in most instances because neither MCL 600. 2925 a(1) applies nor 600.2925 a(2) applies since it refers to common liability. Common liability in most tort situations passed out of existence as did joint and several liability which are two concepts inextricably inter-twined with one another. Michigan now recognizes "fair share liability" which is inextricably inter-twined with the modern tort reform concept of several liability, only, and that a party is never obligated to pay a sum greater than the parties percentage of fault. Several liability as we know it being defined under MCL 600.6304 (4) is married to the new terminology of "fair share liability." This analysis, however, does not end here.

The Restatement of Torts, 3d, Apportionment of Liability, § 11, p 108; is enlightening when referring to a several liability tort system as now enacted by the Legislature. The Restatement states as follows:

> "When, under applicable law, a person is severally liable to an injured person for an indivisible injury, the injured person may recover only the severally liable person's comparative-responsibility share of the injured persons damages."

This is precisely what MCL 600.6304 (4) provides. In further reading of the text at Comment c, it provides as follows:

> "c. *Contribution by severally liable defendant.* When all defendants are severally liable, each one is separately liable for that portion of the plaintiff's damages. Since overlapping liability cannot occur, severally liable defendants will not have any right to assert a contribution claim. *Id. At 109.*

Once again it is of interest to note is that the *Caldwell* decision when referring to an indivisible injury was, referring to pre 1995 Tort Reform. At that time there would exist common liability because there was no way that the injury could be apportioned among the various defendants on any rational basis; since there was no statutory mechanism in place to legally do so. Simply put,

Tort Reform for apportionment of liability had yet to be enacted. The *Caldwell* Court stated:

> "Where two or more individuals are responsible for an accident which produces a single indivisible injury, each individual wrongdoer may be held liable for the entire amount of the damages and thus each of the defendants shares a common liability with the others that are also responsible for the injury." *Caldwell, supra p 420 ftnt 5.*

Under pre-tort reform it is the obligation or the risk of the entire amount of damages that creates the common liability. There does not exist "common liability" with the passage of Tort Reform.

In the context of trying to apply the language of the Tort Reform revisions to the Contribution Statute is like trying to fit a wrong key into a lock. Some of the key may fit as to the type of actions that have been carved out of the statute allowing joint and several liability. The remainder of tort liability does not work within the mechanisms of the Contribution Act. This particular act long predates the 1995 tort amendment and was for a specific purpose, where one party paid a greater proportionate share of its liability because of the parties legal obligation to plaintiff. There no longer exists such a legal obligation of owing all or a greater proportionate share and therefore, the injustice that under the common law, which was eventually remedied by statute that prevented contribution no longer exists. Once again, this would not be a matter of common liability because contrary to the law prior to tort reform there no longer exists total exposure for all of the damages and the damages are apportioned based upon a parties percentage of fault. MCL600.6304(4).

II. THERE DOES NOT EXIST "COMMON LIABILITY" IN MOST TORT ACTIONS SINCE THE ABOLITION OF JOINT LIABILITY.

This section has overlapped with that which has been previously been set forth in the brief.

The Court raises the question as to whether or not there are circumstances where "common liability" may exist among settling tortfeasors and non settling tortfeasors. It is Defendant-Appellees position that whether a party settles or does not settle matters not as to the abolition of "common

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liability." The question as to whether or not there exists common liability would predate any settlement or non settlement. In the context as discussed in *Caldwell* this is a principle that whether parties have joint and several liability or are jointly or severally liable, as not having acted in concert or having acted independently that notwithstanding the type of liability, that the fundamental premise of "common liability" is that a party may be called upon to pay either all of the damages or a greater amount than the parties proportionate share. The obligation to pay all damages predates the 1985 tort amendment and subsequent to 1985 Tort Reform there still was the risk of paying all damages if the plaintiff was not at fault or paying a proportion of the unsatisfied judgment based upon a parties percentage of fault as discussed earlier.

In the 1995 Tort Reform all such concepts were abolished where there are two or more alleged tortfeasors and each tortfeasor is to be treated as being severally liable. MCL 600.2956 is very clear that when it speaks of the term "several" that each party is viewed independent of one another and their extent of liability to the plaintiff is limited to the parties percentage of fault. (MCL 600.2957, 600.6304(4)). In effect, in most situations these statutory provisions have abolished the common law principles of joint and several liability: where one party may be called upon to pay all damages regardless if that party acted jointly or in concert with others or if there are others; whose separate or independent or concurrent acts were liability was imposed on different legal theories were also responsible for the same injury. They also abolished several liability in the context of being responsible for all or a greater amount of damage than a parties proportionate share.

Since "common liability," is a separate and distinct legal concept it neither controls nor is it controlled by whether a party settles or does not settle with the plaintiff. It was a requirement in place pre 1995 Tort Reform being a requisite element to seek contribution if all provisions of the statute were complied with.

1. **Does "common liability" refer to joint liability only, or does it include several liability?**

As set forth in this brief, the concept of common liability entails that each party is responsible for all damages. When one speaks of several liability it can be viewed in the context of jointly and severally liable where there ,may be more than one person liable for an injury but the plaintiff elects to proceed against one of those individuals, only. Several liability may also be viewed from the standpoint that the two tortfeasors did not act jointly but rather were separate, independent or concurrent or liable in tort to the plaintiff on different theories. *O'Dowd, supra 604.* But there is a common thread is that whether several liability arises in conjunction with a party with whom there is joint liability (acting in concert), or if they are liable not having acted jointly but rather, under a separate theory, and the injuries that were sustained are a result of such activity, then under either concept the parties may be responsible to the plaintiff for the whole amount. If the damages differ to some extent, and the party is being sued on a "severally liable theory", then it is only the like damages that each party is responsible for. *Moisenko; O'Dowd, supra 608.* The Legislature, however, under §2956, §2957 and §6304 specifically provides that the liability of each defendant for damages is several, only. Then, delineates what is meant by that under §2957 and §6304 as referring to that parties percentage of fault. So the use of the terms "joint and several" or "jointly or severally", where in the past they referred to "paying all damages" or an excess percentage has been abolished in most situations. What the use of the term "several" under §2956 is addressing is only the situation that a party is no longer liable for the entire amount of damages or a greater proportionate share. It is the distinction in the use of the various terms that clearly reflect that the "several" being referred to in §2956 has no application to the contribution statute because the contribution statute requires under §2925a(1) that there is liability for the same injury and under §2925a(2) there must have been common liability.

Under the 1995 provisions of the Tort Reform Act, however, there no longer exists "common liability" because the parties do not have a common burden or obligation to the plaintiff in which several persons are equally liable or which they are bound to discharge. *Caldwell v Fox 394 Mich*

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401, 417. Under the provisions of MCL 600.2956, liability is several, only, and when used in that context the statute makes it clear that it matters not if the claim is based on tort or any other legal theory which thereby encompasses the variety of ways in which a party may be liable to a plaintiff. That is to say, the concept of several liability as discussed in *O'Dowd* and *Moyses*. So, 600.2956 applies to each variation of the term "several"as to how a party may be liable. In addition it goes on to set forth: " the liability of each defendant for damages is several only and is not joint". MCL 600.2956. By the last phrase, the Legislature clearly is setting forth that the liability of each party is viewed separately. By way of MCL 600.2957 the Legislature then specified that the liability of each person, subject to § 6304 shall be in direct proportion of the persons percentage of fault. With a party only being limited to its percentage of fault the reference to MCL 600.6304 made it clear that common liability is abolished.

Section 600.6304(4) expressly sets forth as follows:

> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). *Gerling, supra, 244-245* **(39-40a)**

So in reading the three statutes together, and with a full understanding with the concept of joint and several meaning that plaintiff may recover all sums or an excess percentage from one party, as well as the meaning of the term "several" which includes situations where the parties do not act jointly but rather independently but are still liable for all of the damages. It is clear the Legislature enacted these statutory provisions limiting ones liability to its percentage of fault, only, and under the modern approach is no longer responsible for the common burden or obligation, i.e. "common liability" to the plaintiff. As such, common liability is only preserved within the exceptions that have been carved out of MCL 600.2956 as it relates to an employers liability, exceptions under MCL 600.6312 and 600. 6304 (6)(a) where the Legislature maintained joint and several liability in a

medical malpractice action where if the plaintiff is free from fault the plaintiff may recover all damages from any one party. The Legislature specifically set forth that in MCL 600.6304(6)(b) that if a parties liability is reallocated, then that party is subject to contribution, and any continuing liability to the plaintiff on the judgment. The Legislature maintained joint and several liability by carving out these exceptions since contribution was not abolished in toto there was no need to repeal all aspects of the contribution statute. Just as an aside at this point, the statute was repealed as it relates to the treatment of payments made by settling parties. This was discussed in the earlier brief. The recognition that contribution did survive certain type of claims was discussed in *Kokx, supra at 662, 663* that there would be no reason for the Legislature to have repealed § 600.2925a since in certain circumstances joint and several liability has been maintained. Furthermore, the Legislature specifically set forth in § 6304(6)(b), when referring to medical malpractice that not only is there joint and several liability where an innocent plaintiff may collect all sums but more importantly the Legislature did acknowledge in that section that on the reallocation of an uncollected judgment that that party remains subject to contribution . There is no other like provision as it relates to parties that come within the provisions of § 2956, 2957 and 6304.

It is also very significant for the Court to note that within the contribution statute at MCL 600.2925b it speaks in terms of how pro rata share of tortfeasors liability is to be determined. It specifically refers to an allocation of the: pro rata share as it relates to the **entire liability** as between themselves only and specifically sets forth that it is without affecting the rights of the injured party to **a joint and several judgment**. (Emphasis added). By the very nature of that provision within the contribution statute it is clear that it is completely at odds with modern Tort Reform. Reading it in accordance with §2925a(2) where it speaks about common liability it is obvious that this act is referring to a situation where a party may be liable for all or in excess of a parties proportionate share of fault. This is but another aspect to demonstrate that the contribution statute although kept

in place for certain claims, it simply does not apply to the abolishment of joint and several liability and a party being only responsible for its proportionate percentage of fault.

III. A PARTIES LIABILITY IS LIMITED TO THAT PERSONS PERCENTAGE OF FAULT AND A PARTY IS NEVER REQUIRED TO PAY DAMAGES IN AN AMOUNT GREATER THAN HIS OR HER PERCENTAGE OF FAULT. ANY PAYMENT MADE IN EXCESS IS MADE AS A VOLUNTEER.

As mentioned, 1995 Tort Reform § 600.6304 maintains contribution in a medical malpractice action. MCL 600.6304(6)(a)(b). Furthermore, contribution may continue in actions where defendant is jointly and severally liable under § 600.6312 pursuant to 600.6304(4). [2] In those limited situations there may exist a right of contribution and as set forth in *Kokx, supra, 663:*

> Moreover, because joint liability remains in certain circumstances, the legislature would have no reason to repeal section 2925(a) which provides for a right of contribution "except as otherwise provided in this Act . . . ."

Except within those areas that have been carved out as situations where joint and several liability may exist there no longer exists any obligation on a party to every pay more than that parties percentage of fault and any payment made in excess of that would constitute being a volunteer. The Court of Appeals in *Gerling, supra* recognizing this, stated as follows:

> "plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability to pay based on its insured's negligence." *Gerling*, 247-248.

Let us for a moment consider the principle of a party being a volunteer. The matter of *Detroit Auto Ins Exchange v Detroit Mut Auto Exchange 337 Mich 50; 59 NW2d 80 (1953)* is enlightening. In that action, the plaintiff sought to recover a proportionate share of a judgment that it paid as an insurer. In that action, the court gave the definition of a volunteer as follows:

> "A 'volunteer' is one who intrudes himself into a matter which does not concern him, or one who pays the debt of another without request, when he is not legally or morally bound to do so, and when he has no interest to protect in making such

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2 As to whether or not contribution may be had by a tortfeasor who acted intentionally is not the subject matter of this appeal.

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payment." *Detroit Auto Exchange, Id. 53-54.*

Plaintiff-Appellant is clearly a volunteer since there exists no obligation, whatsoever to have paid a sum that it now claims to be greater than its proportionate share of liability. This, as we have seen so often, was a settlement that plaintiff subrogee evaluated the extent of its subrogors negligence and considered it within its best interest to resolve the case at an evaluated figure based upon its insureds liability and resulted in bringing the matter to a conclusion. In such situations the plaintiff and the defendant has the benefit of any advantages of the settlement if it turns out in a later action against other non-settling parties that a greater amount was paid and equally shares the risk of this settlement having been disadvantageous if the proportionate share of fault is less than anticipated or the damages were different than the parties had contemplated. But this is what constitutes a settlement. The uncertainty as to what a jury may do is removed and each party has bought their peace, with finality.

Also, in reflecting on settlements in the matter of *Bacon v State Hwy Dept 115 Mich App 382, 385; 320 NW2d 681 (1982)* the court stated:

> "In cases such as the present one, plaintiff and the settling tortfeasor reached an agreement for any number of reasons which benefit both of them."

As discussed in the original brief and will be discussed further in this brief, the contribution statute was amended by deleting the provision that reduced any judgment by an amount paid by the settling tortfeasors. When one speaks in terms of settlement the Court of Appeals in the State of Arizona in the matter of *Roland v Bernstein 171 AZ, 96, 828 p.2d 1237 (1992)* discussed as to whether or not settling parties should have the amount of the settlement paid deducted from the judgment or if the defendant should pay whatever proportionate degree of fault the jury found against the total amount of damages. The Court noted that by the defendant paying the percentage of the total amount of damages (less whatever comparative fault of the plaintiff) does not discourage settlements but rather encourages it because a non-settling tortfeasor may not assess its exposure and

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then consider that it may be reduced by reason of preexisting settlements. In effect, the Arizona court adopted the rational in many other states that the judgement is not reduced by any prior settlement. It is also significant to point out that the state of Arizona also abolished joint and several liability and in so doing recognized that contribution can never occur because their contribution statute, like Michigan's, requires that "two or more persons are liable in tort for the same injury." Under their form of Tort Reform, which is the same as Michigan: "the liability of each defendant for damages is several only and is not joint." The Arizona court went on to say: "in short, each defendant is liable only for the portion of injury he caused, not the whole injury; no two are liable for the same injury". This court cited *Kussman v City and County of Denver, 706 P.2d 776 (CO 1985) Rowland, Id P.2.* These courts have adopted the same rational that was recognized by the Court of Appeals in this matter now before the Supreme Court.

Michigan had the wisdom to delete this section from the Contribution Act recognizing that a party shall only pay its proportionate share of the liability and not take credit for a payment made by another party who had assessed its own liability.

To further reinforce that plaintiff was a volunteer the court is directed to the Contribution Statute which was amended by PA 1995 161 § 1. As set forth in the original brief, §2925d was the subject of the amendment. It provides as follows:

> If a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons that for the same injury or the same wrongful death, both of the following apply: (a) The release or covenant does not discharge or more of the other persons from liability for the injury or wrongful death unless its terms so provide. (b) The release or covenant discharges the person to whom it is given from all liability for contribution to any other person for the injury or wrongful death.

The predecessor statutory provision contained a former subsection (b) which was deleted by the amendment. The deleted provision provided as follows:

> "It reduces the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater."

In order to avoid a duplicate recovery under the common law the amount paid by settlement was reduced pro tanto. Under the statutory provision, which was deleted the *Bacon court, supra* 386 addressed this provision as to how the off-set was to be treated. At that time, joint and several liability had not been abolished, as it now has, under 600.2956. In *Bacon* the court also pointed out that the off-set provision had likewise been left in place when comparative fault was adopted. Under the former provision the off-set was deducted from the total amount of the judgment, since joint and several liability still existed.

Under modern tort reform, however, that provision has been deleted. One must ask themselves as to why the Legislature selected to delete the off-set clause provision of the Act.

When one considers that the legislative objective was to create a "fair share liability system" there would not be situations, except in those areas carved out as an exception that an amount paid by a settling party would be reduced from the judgment. When one considers that the judgment is only for that tortfeasors percentage of fault there is no basis to credit the non-settling tortfeasor with a payment made by another. As for determining that tortfeasors percentage of fault it is not only the fault of the plaintiff that is considered under the doctrine of comparative fault but also that of non-parties, even settling parties that had been released from liability under § 600.2925 d (600.6304 (1)(b)). As mentioned in the previous brief as to those type of claims that have been carved out of the joint and several liability exception the judgment is reduced pro tanto under the common law *Markley, supra 256 -257. Markley* is also enlightening in its discussion as to why there was no necessity for the former subsection that was deleted from § 2925d, by the passage of the 1995 Tort Reform. Once again it is brought to the Court's attention the following statement:

> There would be no need for a set off because the tortfeasor-defendant not involved in the settlement would necessarily be responsible for an amount of damages **distinct from the settling defendant on the basis of allocation of fault**. Therefore, a settlement payment cannot be deemed to constitute a payment toward a loss included in a later damage award entered against the non-settling tortfeasor. *Markley at 255.* (Emphasis added)

i. **When, if ever, might a tortfeasors settlement of a case include another alleged tortfeasor's percentage of fault?**

Since there are certain exceptions carved out of the 1995 Tort Reform such as malpractice and certain torts for which there still exists joint and several liability and an allocation based upon a percentage of fault for an uncollectible amount, there are situations where a party may seek a full release as to other parties. MCL 600.6304 (4)(6)(a)(b). In those situations where there exists joint and several liability or an allocation of an uncollectible amount it would behoove a party to obtain a full release as to all alleged tortfeasors and to comply with the terms of the contribution statute because in those situations there does exist a right to contribution.

Another example may be if a party is concerned about another party being held vicariously liable for an accident, such as the owner of a motor vehicle. Or a party with whom there exists an indemnification provision. In those situations it would be beneficial to the settling party to obtain a full release as to the others to avoid a claim against it for indemnification. Although the release may bar any claim of future contribution against the party entering into the settlement, it does not bar one for indemnity. § 600.2925d (b), 2925a(7). It also does not apply to claims arising out of breaches of trust or of other fiduciary obligations. §2925a(8).

So, there are situations in which a party would seek to have as many individuals and/or entities on the release for which the releasee may have additional exposure if a claim is brought against those parties or in order to seek contribution in those situations where there is joint and several liability.

The inclusion in the release of Lawson and American Beauty was done under a mistaken assumption on the part of Plaintiff-Appellant that all parties had a common burden or common liability to the Plaintiff. This is clearly demonstrated in Plaintiff's Complaint where it was alleged at paragraph 13 as follows:

13. PLAINTIFF REGENTS OF THE UNIVERSITY OF MICHIGAN has been required to pay more than its pro rata share of common liability to Ricki Ash

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and James Nicastri. Appendix 15 a para 13.

Further this is repeated in paragraph 14 where it is alleged that they paid more than their pro rata share of the **COMMON LIABILITY**. Appendix 15 a para 14. This error is then compounded when they were of the mistaken belief that they are entitled to contribution by way of such allegations. The error on the part of Plaintiff-Appellant by way of its unilateral decision to include Lawson and American Beauty in the release does not give rise to a cause of action. This is not something that was suggested or requested by these Defendants but rather, maintain the position of freedom from fault in this accident. It is Plaintiff-Appellant in this action that have spawned unnecessary litigation that is contrary to the whole principle of Tort Reform that a party be responsible for only its percentage of fault. If Plaintiff-Appellant had adhered to the provisions of this statute and the clear intent of the Legislature that one only be responsible for their "fair share liability"its file would be closed and this claim would not exist.

IV. THE AMOUNT OF A PAYMENT IS NOT DETERMINATIVE IF A PARTY IS PAID MORE THAN HIS OR HER PRO RATA SHARE SINCE THERE EXISTS NO COMMON LIABILITY, IN MOST TORT ACTIONS, AMONG AND BETWEEN THE ALLEGED TORTFEASORS.

As set forth earlier in this brief the reason the parties enter into settlements are innumerable. After the adoption of comparative fault a party who settled or was not joined in the litigation did not have its fault determined. So in effect, a settlement may have been entered into with a party and the action then proceeded against the remaining defendant(s). The only fault determined was that between the parties to the action. The remaining defendant(s) received the benefit of whatever sum was paid by way of settling tortfeasor being deducted from the judgment. This was either done under the common law or under the contribution statute as discussed earlier. The settlement with the released party may have been beneficial of disadvantageous to either the plaintiff or that settling party depending on the ultimate outcome and the trial. At times this may have been harsh as

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demonstrated in the action of *Bacon, supra* where the state was found but only 10% at fault but rather simply applying the percentage of fault to reduce the judgment the state only received the benefit of the sum paid by the settling tortfeasor. *Bacon, supra, 385.* Other times the result was just the opposite. So the question as to amount, should matter not because the only time one may determine the adequacy or inadequacy is in hind sight. In this matter now before the Court, Plaintiff/Appellant suggested the jury could award 10 million dollars. With such a thought the insurer must certainly have been of the belief that the settlement it entered into, based upon its analysis of its insureds exposure was well within its financial best interest and that of its insureds. Its insureds would never have been responsible for a percentage of fault greater than their own wrong doing. It had always been this Defendants position that the percentage of Plaintiff-Subrogors fault was 100%. The Plaintiff in the action also had to recognize that the claim against Maus and Regents was several only, based upon their percentage of fault. This has been the playing field since March of 1996 when Tort Reform went into effect. The questions posed by this Court in attempting to determine if a party paid more than its pro rata share it appears to be precisely what the Legislature, by way of the enactments have precluded. Language contained in MCL 600.6304(4) clearly set forth that person shall not be required to pay damages in an amount greater than his or her percentage of fault. A party is given the option of reaching a settlement as to what it believes is within its best interest or utilizing the protection of the statute which likewise is the same consideration for a plaintiff. Recall that the Legislature did delete that there is any credit for payment made by the settling tortfeasor. As mentioned, in Arizona case of *Rowland, supra* it discussed that a statutory provision providing for reduction of claim by amount of settlement no longer applies now that joint and several liability has been eliminated. But it is also directed to the Court's attention the discussion in this case that if a party settles it should serve as an inducement to any non-settling parties because the judgment is not reduced by the amount paid, and there is the risk that if the percentage of fault, if any, allocated to the defendant although may not be great, but when compared

to the total amount of the verdict may result in a substantial amount. On the other hand, from a plaintiff perspective there is a risk of mis-evaluating the percentage of fault as to the non-settling party as well as the amount of damages such that the percentage of fault may be high but the damage is low or vice versa. But plaintiff does have the benefit of not having the judgment reduced by any sums paid but rather, by applying the percentage of fault against what represents the total amount of damages.

The rational of such a rule is that since there exists proportionate liability a defendant can never be liable for more than his or her proportionate share of the total damages and, thus no settlement credit is needed since a party will not be bearing an unfair burden more than its proportionate share of damages. *Rowland, supra.* So since the premise of the statutory provision that a party only pays his proportionate share to accept the invitation of Plaintiff that a party, notwithstanding the clear mandates of the statutory provisions, pay an excess of its proportionate share and then seek contribution opens a Pandora's box that was never meant to be transported with these statutory provisions. If a tortfeasor has a reason to settle for, based upon an anonymity, such anonymity would not be maintained in a contribution action. If it is a matter of quick resolution it still would have to be predicated upon a recognition of fault. Even with the idea of a quick resolution it still has the same fundamental basis of buying ones peace balanced against the potential of what it may cost in the future. These are settlements. Although these may be inducements unique to that particular party and if that party elects to forego the legislative protection and the public policy of this state that the liability is only for one's "fair share of liability" then that is an economic decision which that party makes based upon other intangibles. Under the former law, where there was joint and several liability or a payment of allocation of uncollectible fault, that risk was always present. This is no longer the situation. When one talks about settlements it is not only the assessment of ones own percentage of fault, but also the abolishment of common liability protects that tortfeasor from another tortfeasor seeking contribution against it, if such a claim is made, where

there still exists joint and several liability as discussed in this brief pursuant to §600.2925d. The statute certainly protects those that have been carved out as an exception. This protection, whether it be by §2925d or more importantly by the complete abolition of the right of contribution is in fact a strong public policy reason for parties to enter into a settlement.

For the Legislature to have adopted fair share liability, being in place for over eight years a party not only has the protection for not having any subsequent claim filed against it, but also, forces each party to recognize that notwithstanding if a plaintiff is totally free from fault that a "deep pocket defendant" will not be called upon to pay all damages but only its percentage of fault. It also affords both parties the opportunity to recognize that even those against whom an action may not be brought will have their proportionate share of fault determined. This is a sound public policy, long time in the making. To accept the Plaintiff's proposition that there still exists contribution would take a giant step backwards where a plaintiff may revert back to the former method of case resolution and demand the full amount from a defendant or a substantial amount beyond that which the defendant or for that matter the plaintiff, appreciates as being his proportionate share of fault under the specter that that defendant may then go seek contribution. That is to say, more litigation. Simply because a party is of the belief it is free from or differs in the belief as to a percentage of wrongdoing; or more importantly respects the law that its liability is only fair share liability and will never be called upon to pay more than its proportionate share of fault and, thereby, does not participate in meeting the demands being made against it, does not serve as a basis to disrupt the process of Tort Reform now emerging in this state. This is not a door the Legislature left open for those cases in which joint and several liability has been abolished by the adoption of "fair share liability." Paying only ones proportionate share completely negates the concept of "common liability" and therefore, it does not even come within the purviews of the contribution statute.

V. A PARTY MAY ONLY PLEAD A CLAIM FOR CONTRIBUTION IS IT IS A TORT ACTION THAT HAS BEEN PRESERVED UNDER §600.6304(4). OTHERWISE, SINCE THE ABOLITION OF JOINT LIABILITY THERE

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EXISTS NO COMMON LIABILITY TO PLEAD A CONTRIBUTION ACTION.

The difficulty with this question is that the premise is that there may be a cause of action pled. It is Defendants position a plaintiff, other than the few exceptions, may not plead a cause of action for contribution because they may not meritoriously plead a payment more than a pro rata share of common liability because there does not exist common liability. In those isolated cases such as medical malpractice, vicarious liability or and certain other wrongdoing the requisite for pleading is set forth in §2925a. A party must plead that in situations involving a settlement there was liability to the full extent of plaintiffs damages or some portion based upon comparative fault of the plaintiff, itself and others; and, that an amount greater than its pro rata share of common liability was paid; and, that the liability the contributee was extinguished by settlement (of the common liability); and, a reasonable effort was made to notify the contributee of the settlement negotiations; and, the contributee was given a reasonable opportunity to participate in the settlement negotiations; and , the settlement was made in good faith.

It is Defendant's position that other than the exceptions set forth in §6304(6)(a)(b), vicarious liability, and perhaps § 6312 that a plaintiff may not successfully plead a cause of action for contribution and may not create a cause of action that does not exist.

VI. A PARTIES FAILURE TO HAVE FAULT ASSESSED UNDER MCR 2.112(K), MCL 600.2957 AND 600.6304 AND ENTERS INTO A SETTLEMENT, RESOLVES ANY CLAIMS AS TO ITS PERCENTAGE OF FAULT.

Plaintiff-Appellant did not attempt to join Defendant-Appellee in the action that was pending against it. Had it of taken those steps and a judgment was entered against it, it still would not have been entitled to any claim of contribution since it would have only been paying its pro rata share of fault. *Kokx, supra 662-224.* Plaintiff-Appellant suggested it filed a notice of fault of non party as provided in MCR 2.112(K). The Plaintiffs in the underlying case did not add Defendant-Appellees in the actions filed against Maus and Regents. Therefore, if Maus and Regents did not consider itself

to be 100% at fault the Legislature afforded it the opportunity to develop the case in support of its position. It apparently was aware of the provisions of the 1995 Tort reform Act but elected to disregard the safe guards within the provisions and operated as if Tort reform had never occurred.

Throughout this record Plaintiff-Appellant has never indicated to this Court any reason other than accessing its own liability as to the basis that it entered into a settlement. Regents was also defending the claim advanced against it by Defendant Lawson who was plaintiff at the time. Its misguided strategy was to resolve the case of Lawson against Regents as well as the two cases filed by the original Plaintiffs against it and then rather than exercising the protection afforded to it under the statutes and the public policy of this state, filed its contribution claims in hopes of securing some "found money."

In the action filed against Regents by Lawson, would have been subject to the same Tort Reform provisions as Ash and Nicastri where subject to. That is to say, Maus and Regents would never be obligated to pay any sums greater than its percentage of fault, taking into consideration that the fault, if any, of Ash and Nicastri and Lawson. Once again, they elected not to proceed with this determination but rather, entered into a settlement, and each cause of action which would have decided those issues were dismissed with prejudice. This dismissal with prejudice as to the Lawson case against Regents bars any further relitigation of the issues of allocation of percentage of fault. In that action, fault of Maus and responsibility of Regents would have been specifically pled. This action would have served as another opportunity for Regents to establish all parties percentage of fault, if it was of the belief that it was not 100% at fault. That claim of proportionate degrees of fault would have already been before the Court as a matter of law. By its trial strategy of reaching a settlement and dismissing the case with prejudice, to only then file the claim for contribution shortly thereafter, is contrary to the principles of res judicata. Now, in this action, Plaintiff-Appellant is attempting to determine a percentage of fault between these parties, which could have been a matter litigated in the action filed by Lawson against Regents. As such, the order of dismissal with

prejudice ends any further question in this regard. Any attempt to argue allocation of fault in this action is barred due to the doctrine of res judicata which precludes relitigation of the same claim or collateral estoppel which precludes relitigation of the same issue. *McCoy v Cooke 165 Mich App 662, 666; 419 NW2d 44 (1988).* [3] In the matter of *Jones v State Farm Mut Automobile Ins Co 202 Mich App 393, 401; 509 NW2d 829 (1993)* the Court stated as follows:

> This Court stated that the test for determining whether two claims arise out of the same transaction are identical of res judicata purposes is "whether the same facts or evidence are essential to the maintenance of the two actions."

This test is not whether the grounds asserted for relief are the same. Clearly, Plaintiff-Appellant had an opportunity to present one of the essential elements and that being an allocation of fault and upon failure to do so, the dismissal with prejudice acted as an adjudication on the merits

Although it remains Defendant-Appellees opinion that there never would have been a contribution claim that could have been asserted because of the absence of common liability and the provisions of the 1995 Tort Reform, it does not change the fact that a requisite element of the claim being advanced is the allocation of fault which has been effectively forfeited by the dismissal with prejudice of the action of Lawson against Regents.

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3 See also Mack v Farney Unpublished Docket No: 201562 decided April 6, 1999. Appendix 20b

RELIEF REQUESTED:

It is requested of this Honorable Court to affirm the Court of Appeals and to interpret the relevant statutes that contribution, with the exception of those specified instances where joint and several liability exist, has been abolished by the provisions of Tort-Reform which is in complete accord with the public policy of this state, irrespective if a party reaches a settlement prior to any specific allocation of fault.

Respectfully submitted:
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